

***United States Court of Appeals
for the Second Circuit***

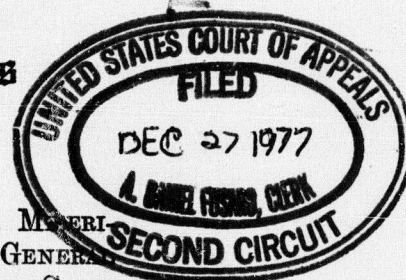


**APPELLANT'S
REPLY BRIEF**

ORIGINAL

77-6174

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT



HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., MEMORIAL
CORDIA HOSPITAL MEDICAL CENTER, BUFFALO GENERAL
HOSPITAL, THE GENESEE HOSPITAL, and THE MOUNT SINAI
HOSPITAL on behalf of themselves and all other nonprofit
hospitals which are members of the HOSPITAL ASSOCIATION
OF NEW YORK STATE, INC., and which are reimbursed for Medicaid Services rendered to hospital
patients,

Plaintiffs-Appellants,

—v.—

PHILIP L. TOIA, as Commissioner of Social Services of the
State of New York, ROBERT P. WHALEN, as Commissioner of Health of the State of New York, PETER
GOLDMARK, as Director of the Budget of the State of New York, HUGH L. CAREY, as Governor of the State of
New York,

Defendants-Appellees,

—and—

F. DAVID MATHEWS, as Secretary of the United States
Department of Health, Education and Welfare,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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HOSPITAL ASSOCIATION OF NEW YORK STATE, :
INC., MISERICORDIA HOSPITAL MEDICAL :
CENTER, BUFFALO GENERAL HOSPITAL, THE :
GENESEE HOSPITAL, and THE MOUNT SINAI :
HOSPITAL on behalf of themselves and all :
other nonprofit hospitals which are mem- :
bers of the HOSPITAL ASSOCIATION OF NEW :
YORK STATE, INC., and which are reim- :
bursed for Medicaid Services rendered :
to hospital patients, :

Plaintiffs-Appellants, :

-against- :

PHILIP L. TOIA, as Commissioner of :
Social Services of the State of New :
York, ROBERT P. WHALEN, as Commissioner :
of Health of the State of New York, :
PETER GOLDMARK, as Director of the :
Budget of the State of New York, HUGH :
L. CAREY, as Governor of the State of :
New York, :

Defendants-Appellees, :

-and- :

F. DAVID MATHEWS, as Secretary of the :
United States Department of Health, :
Education & Welfare, :

Defendant. :

Docket No.
77-6174

-----X
ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

PRELIMINARY STATEMENT

Having the advantage of reading Judge Lasker's opinion (State Defendants' Brief, Appendix A) -- which was filed on November 18, 1977, four days after we were required to file our main brief -- the State Defendants now rely solely on the rationale that the dismissal of this action was justified because the record below is "stale and incomplete." (State Defendants' Brief, p. 3.) Conceding that a live controversy continues to exist regarding the 1976 amendments (State Defendants' Brief, pp. 8, 9), the State Defendants understandably attempt to avoid our answer to the mootness question by casually labeling that question "beside the point." (State Defendants' Brief, p. 7.)* Instead, they argue, the only "meaningful prospective relief" (State Defendants' Brief, p. 8) that can be awarded necessarily involves review by the District Court of the 1977 amendments because of the purported substantial changes effected by those amendments (State Defendants' Brief, pp. 4, 8, 10), and that the failure of the hospitals to develop a record as to the effect of the 1977 changes warranted dismissal by the District Court in the exercise of its discretion. (State Defendants' Brief, pp. 8, 14.)**

* In his remarks at the September 14, 1976 conference, which were incorporated into the opinion dismissing this case, District Judge Lasker stated that upon motion by the State Defendants he would dismiss "on the grounds of mootness..." (785).

** The State Defendants do offer a short discussion of the 1976 amendments in Appendix B of their brief. Our response to some of their points is contained in the Appendix hereto.

The State Defendants miss the mark for several reasons. First, by operation of 10 NYCRR §86-1.11, 86-1.15 and 86-1.21(k), the 1976 amendments as promulgated in 1976 have a prospective effect in 1978, 1979 and future years. (Plaintiffs' Brief, pp. 24, 30-31.) Accordingly, a determination that those amendments were illegal in 1976 is essential, if meaningful relief is to be granted correcting the pernicious effect that those amendments will have in the future.*

Second, contrary to the State Defendants' assertions, mootness considerations are directly pertinent to the question of whether a case should be dismissed because of a "stale or incomplete" record, because a threshold inquiry is whether changing events have so altered the controversy as to render the existing record inadequate.

Third, notwithstanding the State Defendants' persistent misreading of Jordan v. Trainor (State Defendants' Brief, pp. 22-24), the District Court may grant meaningful declaratory relief which has the effect of "triggering" remedial action in state tribunals. (Plaintiffs' Brief, pp. 47-50.)

Thus, there are live, significant issues to be adjudicated regarding the 1976 amendments, with the prospect of meaningful relief if the hospitals prevail. And at no time have the State Defendants argued that the record is incomplete

* The litigation challenging the 1977 changes (State Defendants' Brief, p. 12) involves issues entirely separate from those raised in this case.

as to those 1976 issues. Accordingly, their reliance on Public Affairs Associates, Inc. v. Rickover, 369 U.S. 111 (1962), and its progeny is totally misplaced.

ARGUMENT

THE RECORD BELOW PROVIDES A FULL AND ADEQUATE BASIS FOR ADJUDICATION OF THE CONTROVERSY BETWEEN THE PARTIES AS TO THE 1976 AMENDMENTS

A. The Effect of 10 NYCRR §§86-1.11, 86-1.15 and 86-1.21(k).

The State Defendants argue that the District Court properly exercised its discretion in dismissing the case because the 1977 amendments so changed the State Plan promulgated in 1976 that the record developed by the hospitals as to the 1976 amendments is too stale and incomplete. In making this argument, the State Defendants ignore the effect of 10 NYCRR §§86-1.11, 86-1.15 and 86-1.21(k), which, as promulgated and applied in 1976, have a prospective effect on rates set in 1978, 1979 and future years. Thus, regardless of any changes that may have occurred in 1977, the illegality of the 1976 amendments in 1976 must be adjudicated, if meaningful prospective relief is to be granted eliminating the future pernicious effect of the unlawful action of the State Defendants.* Unable to answer this point,

* Indeed, in their brief in No. 77-6152 the State Defendants assert that the hospitals were reimbursed under the 1976 State Plan in conformity with the "reasonable cost" standard of the Medicaid Act. State Defendants' Brief in No. 77-6152, pp. 32, 58. There is thus a live, significant controversy as to the 1976 amendments that should be promptly adjudicated.

the State Defendants have chosen to disregard completely our discussion of 10 NYCRR §§86-1.11, 86-1.15 and 86-1.21(k).

(See Plaintiffs' Brief, pp. 30-31.)

B. Mootness Considerations Are Pertinent to a Determination of Whether The Case to be Adjudicated Rests on a Stale or Incomplete Record.

Nowhere in their brief do the State Defendants argue that the record developed in this case is stale, incomplete or inadequate for an adjudication of the hospitals' challenge to the 1976 amendments. Nor could they make such an argument, for in the eighteen months that this litigation has been pending thousands of pages of depositions have been taken, many hours of conferences have been held with the District Judge and every variety of issue has been briefed in preparation for trial. Rather, the State Defendants simply contend that the 1977 amendments now require a trial of the legality of the State Plan as it exists in 1977 and that, accordingly, a record must be developed as to those 1977 changes. It is contended that, though not technically moot, the case as to the 1976 amendments is insubstantial at this juncture.

This argument is bottomed on the bald, unsupported assertion that the 1977 amendments substantially revised the State Plan as promulgated in 1976. In other words, despite their protestations, in reality the State Defendants do argue

that the 1977 amendments mooted the hospitals' challenge to the 1976 Plan in the sense that the 1977 changes have rendered the controversy insubstantial.

Indeed, it is clear from Alton & Southern Railway Co. v. International Association of Machinists & Aerospace Workers, 463 F.2d 872 (D.C. Cir. 1972), one of the authorities upon which the State Defendants rely (State Defendants' Brief, p. 16), that an analysis based upon mootness considerations is the starting point for determining whether changing events render a record too stale or incomplete for the award of meaningful relief. Alton involved a strike by four shopcraft unions against certain railroads. After serving notice of an intention to strike, mediation resulted in a memorandum of understanding between the unions and the employers. The membership of one of the unions, however, failed to ratify the memorandum of understanding, precipitating a strike by all of the unions pursuant to a prior arrangement among them. Id. at 875.

The strike was preliminarily enjoined by a United States District Court. Shortly thereafter federal legislation was enacted that imposed upon the parties the settlement set forth by the terms of the memorandum of understanding. Id.

In dismissing the union's appeal from the preliminary injunction order, the Court of Appeals applied a mootness

analysis to determine whether in its discretion it should dismiss the appeal because no meaningful relief could be granted. The Court observed, first, that the legislatively imposed settlement ended the effect of the preliminary injunction order. Id. at 876. Because the "particular controversy" between the parties had expired, there was "no duty or obligation of the court to maintain the appeal...." Id. at 880 (emphasis added).

The Court also considered whether the case came under the doctrine of "capable of repetition, yet evading review." Id. at 878-880. The Court found that even when "the particular controversy has expired" (id. at 880), the likelihood of repetition and the public interest involved are compelling considerations against discretionary dismissal. Id. at 878, 880.

Applying the Alton analysis to the instant case, it is clear that the State Defendants never satisfied the threshold requirements warranting discretionary dismissal by the District Court. First, in our main brief we provide extensive discussion as to why the 1977 amendments did not eliminate the "particular controversy" regarding the 1976 amendments or affect its substantiality. In response, the State Defendants merely assert that the 1977 amendments did have that effect, without in any way satisfying their heavy burden of proof on the ques-

tion.* Moreover, they completely ignore the authority discussed in our brief (pp. 34-36) that the mere fact of such revisions does not terminate the controversy as to the 1976 amendments or render it insubstantial.** Under these circumstances the District Court had a "duty" and "obligation" to adjudicate the case. Alton, supra, 463 F.2d at 880.

The State Defendants do proffer Fusari v. Steinberg, 419 U.S. 379 (1975), as authority for their contention that the 1977 amendments made it inappropriate for the District Court to grant declaratory or injunctive relief regarding the State Plan as promulgated in 1976. That case is easily distinguished.

In Fusari the statute under attack had undergone "major revisions" while the case was before the Supreme Court. Id. at 385. It was anticipated that the changes in the state law would "alter significantly the character of the [administrative] system considered by the District Court."

* See Kaye v. Funding Systems Corp., Docket No. 76-7272 (2d Cir., June 20, 1977), decision vacated by order dated June 29, 1977, which was discussed in our main brief at pp. 32-33. (The decision in Kaye was vacated in conjunction with a stipulation entered into by the parties dismissing the appeal with prejudice. The soundness of the reasoning underlying Judge Knapp's opinion is obviously unaffected by the vacatur.)

** See also, Southern Pacific Terminal Co. v. I.C.C., 219 U.S. 498, 516 (1911), indicating that challenges to rates that expire during the pendency of litigation are not thereby mooted, because of the propriety of deciding the question of law to guide the ratemaking body in the future.

Id. at 386-387. In particular, the legislative amendments affected the speed of the administrative procedure under attack, which was the essence of the statutory and constitutional questions involved. Id. at 387-388. Under such circumstances, the Court found it inappropriate to adjudicate the case, because it could only "speculate" as to whether the entirely new administrative procedure would present the same problems. Id. at 388-389.

Thus, Fusari stands for nothing more than the basic principle that a change in a law or regulation during the pendency of litigation moots the case where the change completely satisfies the objections of the plaintiffs.* See, e.g., Diffenderfer v. Central Baptist Church of Miami, Florida, Inc., 404 U.S. 412 (1972); see also, Preiser v. Newkirk, 422 U.S. 395 (1975). (It is noteworthy that even in Diffenderfer, where the Court found that granting the relief requested was "inappropriate now that the statute has been repealed", the plaintiffs were

* Hagans v. Wyman, 527 F.2d 1151 (2d Cir. 1975), also cited by the State Defendants, adds nothing to their argument. Although framed in terms of "mootness", it is clear that the decision is really based on considerations of standing. The challenged regulation had been amended in such a way that none of the plaintiffs were affected by the new regulation, and the Court of Appeals noted that the addition as plaintiffs of persons in fact affected by the amended regulation would obviate the mootness problem. 527 F.2d at 1153. Subsequently, this Court reviewed the case on the merits. 536 F.2d 525 (1976).

Similarly, Richardson v. Wright, 405 U.S. 208 (1972) (State Defendants' Brief, p. 19n.), offers no support. The Court there declined to review the challenged administrative practice to avoid adjudication of a constitutional issue. That consideration is not apposite here.

given leave to amend their complaint to show that "the repealed statute retains some continuing force...." 404 U.S. at 415.)

By no stretch of the imagination have the 1977 amendments so revised the 1976 Plan as to satisfy the objections for which the Hospitals contend in this lawsuit. Indeed, despite the State Defendants audacious and unsupported statement that there is no dispute that the 1976 State Plan underwent "substantial revision in 1977" (State Defendants' Brief at p. 10), we show in our main brief (pp. 9-24) that the 1977 amendments had neither the scope nor the ameliorating effect attributed to them by the State Defendants. Accordingly, this case does not come within the Fusari-Diffenderfer line of cases.

Nor have the State Defendants answered the argument that, even if the 1977 amendments significantly altered the State Plan, this is a case "capable of repetition, yet evading review." As we explained in detail in our main brief, the challenged 1976 provisions were carried forward virtually intact in 1977.

It is argued nevertheless that the fact of the 1977 changes bars consideration of the 1976 amendments. Yet the State Defendants acknowledge that these Medicaid regulations are regularly changed. (State Defendants' Brief, p. 20.) The frequency of such administrative changes and their potential for constantly frustrating judicial review of

government action is precisely the situation covered by the doctrine of "capable of repetition, yet evading review." See Alton, supra, 463 F.2d at 878n.9. (Indeed, in their motion to dismiss, the State Defendants intimated that proposed 1978 amendments would again "affect to some degree some of the provisions that plaintiffs have identified as supporting their challenge" [794n.]*) As indicated by the court in Alton, even though the "particular controversy" may have expired, the likelihood of repetition, together with the public interest involved, requires adjudication of the case. Id. at 878, 880.

Finally, the State Defendants cannot find any support for their argument in Judge Lasker's "intimate famili-

* The State Defendants' argument that the Hospitals have failed to meet their burden on this point is specious. In determining whether illegal administrative action is likely to recur, a court must consider "the bona fides of the expressed intent to comply, the effectiveness of the discontinuance [of the illegal action] and, in some cases, the character of the past violations." United States v. W. T. Grant Co., 345 U.S. 629, 633 (1953).

The persistence of the challenged 1976 provisions in 1977 speaks to the intention of the State Defendants to continue their conduct. And their prior willingness to act "in blatant disregard" (713) of federal law sufficiently indicates the character of their past violations.

Moreover, it is absurd for the State Defendants to contend that they have satisfied their burden of proof. Under Kaye v. Funding Systems Corp., supra, the State Defendants were required to show "no genuine issue" as to the effect of the 1977 amendments. Id. at Slip Op. p. 4260. Their bald assertions and unsupported conclusions fall far short of this standard.

arity with the case...." (State Defendants' Brief at p. 22.) The District Judge stated quite plainly on the record that he was not at all certain as to the effect of the 1977 amendments and that the motion to dismiss was being granted to have the views of this Court before proceeding with a lengthy trial. (Plaintiffs' Brief, p. 27 n.)* In any event, the District Court's findings as to the effect of the 1977 amendments (see State Defendants' Brief, p. 14) are not supported by the evidentiary base required by Kaye v. Funding Systems Corp., supra.

C. The District Court May Grant Declaratory Relief That Would Serve as Guidance in a State Tribunal.

In their brief, the State Defendants persist in misreading the holding of Jordan v. Trainor, 551 F.2d 152 (7th

* See also (776-77). Contrary to the State Defendants' reading of the transcript of August 11, 1977 (State Defendants' Brief, p. 20), the District Judge indicated his belief that the Hospitals would be entitled to relief as to the 1976 amendments without the necessity of adjudicating the 1977 changes as well:

"...I might, or a trier of fact might, be persuaded, and this certainly has been Mr. Imberman's contention almost from the beginning, that by and large, the hundred percent average is going to result in less than full and reasonable costs and, if he is right on that, he is entitled to at least declaratory relief of some kind and we have to perhaps iron out the fine points as to some situations where it did grant reasonable costs and others where it did not but it doesn't seem to me that that kind of thing, that one in particular, which is fundamental, would necessarily be substantially affected by changes that might have occurred in 1977."
(725-726.)

Cir. 1977), modified, 563 F.2d 873 (7th Cir. 1977) (en banc). As explained in our main brief, the decision of the original three-judge panel in Jordan v. Trainor was based upon the premise that the admission of liability required by the District Court to be included in the class notice "would automatically result in payment of state funds." 551 F.2d at 154. The en banc panel modified the ruling of the three-judge court to permit the class notice with the admission of liability provision deleted. 563 F.2d at 875. The en banc panel concluded that the amended notice would not present an Eleventh Amendment problem, because there would not be any predetermination of the State's monetary liability and the State would be free to raise in a state tribunal whatever defenses were available to it. Id.

Thus, as modified en banc, Jordan v. Trainor stands for the exact proposition that we stated, namely, that a District Court may declare a violation of federal law and take action which could "trigger" proceedings in a state tribunal. As long as there is no "'award of an accrued monetary liability..." (Milliken v. Bradley, 97 S. Ct. 2749, 2761-62 [1977] [emphasis in original and added]), declaratory relief as to past violations does not offend Eleventh Amendment principles.*

* Fanty v. Commonwealth of Pennsylvania, Department of Public Welfare, 551 F.2d 2 (3rd Cir. 1977), discussed in the State Defendants' Brief at p. 23n., offers no additional support. The three-judge panel that decided that case was completely divided, each judge filing a separate opinion.

D. The State Defendants' Cases.

The authorities relied upon by the State Defendants (State Defendants' Brief, pp. 16-27) to support their argument that the District Court had the discretion to dismiss this case are totally inapt. In Public Affairs Associates, Inc. v. Rickover, 369 U.S. 111 (1962), the basic facts underlying the action were never adduced below. As explained above, here there is a fully-developed record as to the 1976 amendments.

The disposition of the case rendered further relief irrelevant in Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir. 1973) (en banc), cert. denied, 411 U.S. 917 (1973), and United States v. Hooper, 432 F.2d 604 (D.C. Cir. 1970). We have shown here that even if the District Court's vacatur of the August 2, 1976 judgment is upheld, significant and relevant relief can be granted to remedy the continuous injurious effects of the 1976 amendments.

In Panama Processes, S.A. v. Cities Service Co., 362 F. Supp. 735 (S.D.N.Y. 1973), aff'd on opinion below, 496 F.2d 533 (2d Cir. 1974), the plaintiff failed to ask for complete relief. That is not the situation here, where complete relief is sought that would terminate the controversy as to the 1976 amendments.

Finally, in National Health Federation v. Weinberger, 518 F.2d 711 (7th Cir. 1975), the action was dismissed because of a prior pending action. That consideration is not relevant to the case at bar.

CONCLUSION

The judgment of dismissal should be reversed and the case remanded to the District Court for a trial on the merits.

Dated: New York, New York
December 27, 1977.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX

In Appendix B to their brief, the State Defendants offer a brief response to our detailed discussion (Plaintiffs' Brief, pp. 8-24) of the 1976 amendments and their effect. It is evident from the positions of the parties that there remains a substantial, live controversy regarding those amendments that should be adjudicated below. This appendix shall merely highlight some of the major errors in the State Defendants' discussion.

With regard to 10 NYCRR §86-1.14(b), the State Defendants are simply wrong in stating that hospitals are grouped in accordance with comparability factors. Grouping is based on gross factors such as size and there is no homogeneity in the hospital groups. See, K. G. Bauer, Hospital Rate Setting - This Way to Salvation?, 55 Milbank Mem. Fund Q. 117, 144 (1977).

There is nothing in the record of this case to show that a 100% ceiling encourages efficiency in operation, unless lower expenditures always means more efficient operation. Because hospitals in a group are not identical, the arbitrary 100% ceiling penalizes those hospitals that may well be operating efficiently, yet have higher costs than average because of the more sophisticated nature of their operations.

In their discussion of section 86-1.21(k) the State Defendants state that "[t]his provision specifically permits an exception to allow for rate increases to take account of

approved new or expanded services subsequent to the base year." (State Defendants' Brief at p. 7). This statement is extremely misleading. Section 86-1.21(i) merely provides that a hospital may pursue its rights in the appeals process. However, the decision as to whether or not to grant an appeal is wholly within the unlimited discretion of the State Defendants and under the State Plan this discretion can be exercised without regard to any objective standards.

The State Defendants contention that the appeals process under Section 86-1.17 is consistent with federal and state practice is wrong. Unlike the usual administrative rate-setting system, here it is the payer of the funds that sets the rate and decides all appeals, causing an impermissible bias.

Contrary to the State Defendants' contention, Section 86-1.31 is directly related to the Hospitals' efforts to reduce costs. If a hospital is receiving inadequate reimbursement it may have no choice but to eliminate a service, in which case it will be subject to a rate revision under section 86-1.31.

Finally, the State Defendants are wrong in asserting that out-patient rates are not properly attacked in federal court. Our challenge is based, inter alia, on a federal Medicaid regulation.

AFFIDAVIT OF SERVICE BY MAIL

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Lynne Landsman being duly sworn, deposes and states:

I am not a party to the action, am over 18 years of age
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the attached

 Reply Brief
enclosed in a postpaid properly addressed wrapper
 in an official depository under the
exclusive care and custody of the United States Post Office
Department within the State of New York.

Lynne Landsman

Lynne Landsman

Sworn to before me this
27th day of December , 1977.

Franklin S. Bonem
Notary Public

FRANKLIN S. BONEM
Notary Public, State of New York
No. 41-0349800
Qualified in New York County
Commission Expires March 30, 1979